THE MODERN SEPARATION OF POWERS: WOULD JAMES MADISON HAVE UNTIED ULYSSES?

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This Article reflects on some of the Court's most important separation of powers cases, focusing primarily on the recent challenge to the Gramm-Rudman-Hollings Act resolved by the Supreme Court in Bowsher v. Synar. *Much of the debate in this area has centered on the proper judicial emphasis on formalist as opposed to functionalist methodologies. This Article criticizes the standard functionalist approach without adopting formalism.*

The tendency of generals to prepare to fight the previous war has been widely remarked. In the area of the constitutional separation of powers, the Supreme Court's majority is not completely immune from the same strategic disorder. In its most recent significant separation of powers case, *Bowsher v. Synar*,[1] the Court intoned gravely that

> [n]o one can doubt that Congress and the President are confronted with fiscal and economic problems of unprecedented magnitude, but "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."[2]

The crux of the problem posed by *Bowsher v. Synar*, however, was not the contemporary equivalent of that posed by such leading separation of powers cases as the Truman-era steel seizure case, *Youngstown Sheet & Tube Co. v. Sawyer*.[3] President Truman's alleged desire to in effect legislate, as opposed to execute congressional statutes, in order to promote the uninterrupted flow of steel production during the Korean War, rightfully calls for the response quoted above in *Bowsher*. But *Bowsher v. Synar*, in which the Court struck

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[1] 106 S. Ct. 3181 (1986).

[2] *Id.* at 3193-94 (quoting Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 944 (1983)).

[3] 343 U.S. 579 (1952).

down crucial provisions of the Gramm-Rudman budget-balancing statute[4] as violative of the separation of powers, is not a case in which a coordinate branch, panicky over the "unprecedented magnitude" of a problem, tyrannously, or potentially tyrannously, intruded in a classically "ambitious"[5] way on the proper domain of another branch of government.

Gramm-Rudman did not constitute an ambitious seizure of power or "encroachment" by Congress, in such a way as to pose an eventual threat to the liberties of citizens. Gramm-Rudman is more plausibly analyzed as an act of congressional abnegation of congressional responsibilities, or at the very least, an ingenious, theoretically well-reasoned congressional attempt at a sort of self-restraint. Similarly, Gramm-Rudman is not most illuminatingly viewed as reflecting congressional concern over the "magnitude" of the budget deficit problem, or the budget deficit's status as a national emergency requiring an immediate response. Instead, Gramm-Rudman is most usefully viewed as a creative, if experimental, response to a "deep" problem in the nature of representative democracy and budgeting in the modern welfare state itself. The problem is arguably resistant over time to ordinary electoral and congressional voting processes, despite the sincere preferences of Congress and the electorate. What is disturbing about *Bowsher* is that these observations about Gramm-Rudman were not confronted on their own ground, or even expressly noted by the Court.[6] This Article addresses these important concerns

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[4] Pub. L. No. 99-177, 99 Stat. 1038 (codified at 2 U.S.C. §§ 901-922 (Supp. 1986)).

[5] *See* THE FEDERALIST No. 51, at 347 (J. Madison) (J. Cooke ed. 1961). *See also* Strauss, *Formal and Functional Approaches To Separation-of-Powers Questions — A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 488-89 (1987) (reporting that the Supreme Court in *Bowsher* viewed the Gramm-Rudman statute as an expansion of congressional power at the expense of the President, but also characterizing Gramm-Rudman as a congressional attempt at self-discipline).

[6] This may partially reflect the superficially reassuring, but ultimately disquieting, predominant emphasis on formalism in the Court's analysis. *See* Bowsher v. Synar, 106 S. Ct. at 3205 (White, J., dissenting); *see also* the case review of *Bowsher* in *The Supreme Court, 1985 Term — Leading Cases*, 100 HARV. L. REV. 100, 221-30 (1986). To the extent that formalism is a matter of ignoring actual or predicted real-world consequences of the statute, the Court's emphasis on formalism may be partly attributable to the expedited judicial resolution of the controversy, which ran from the presidential signature of the Gramm-Rudman Act on December 12, 1985 to the Court's decision on the following July 7.

that were ignored in the *Bowsher* opinion itself.[7]

I. THE COURT'S DECISION IN *BOWSHER V. SYNAR*

The Gramm-Rudman Act, a federal budget deficit control technique, required roughly across-the-board reductions in federal spending programs in the years 1986 to 1991 if Congress was not able, through the ordinary appropriations process, to make continual progress in reducing the federal deficit. The crucial provision, section 251 of the Act, required the Office of Management and Budget and the Congressional Budget Office to submit their estimates of the impending deficit, and the correspondingly necessary budget reductions, along the general lines established by Congress, to the Comptroller General. Under section 251 of the Act, the Comptroller General then presents his analysis to the President, who is then required to issue an order mandating the spending reductions specified by the Comptroller General, unless Congress itself intervenes with sufficient spending reductions.

The Supreme Court held this crucial provision violative of the separation of powers on the grounds that the Act contemplated the exercise of independent judgment and ultimate executive authority by the Comptroller General, who is removable only by Congress. The Court concluded that the Comptroller General, as an officer subject to the control preeminently of the legislative branch, may not constitutionally exercise powers that are essentially executive in character. Congress may not reserve for itself control over the execution of the laws.[8]

The Court's analysis was thus essentially what would have been expected and appropriate for an "inverse" steel seizure case.[9] Congress, on this view, overreacted to a perceived crisis, or problem of great "magnitude,"[10] by "ambitiously"[11] seizing presidential or executive branch

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[7] The three-judge district court that issued the original opinion in the case also omitted any reference to the issues addressed in this Article. *See generally* Synar v. United States, 626 F. Supp. 1374 (D.D.C. 1986)(Scalia, Johnson, & Gasch, JJ.), *aff'd sub nom.* Bowsher v. Synar, 106 S. Ct. 3181 (1986).

[8] *Bowsher*, 106 S. Ct. at 3188.

[9] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). *See also supra* text accompanying note 3.

[10] *See supra* text accompanying note 2.

[11] *See* THE FEDERALIST No. 51, *supra* note 5.

prerogatives. This analysis is, however, unreflective of the evident intent and motivation of Congress, and unresponsive to the nature of the underlying problem perceived by Congress.

II. *BOWSHER* AND THE PURPOSES OF THE SEPARATION OF POWERS

The separation of powers doctrine is not a mysterious totem that, if ritualistically invoked, will protect us from harm. It is a functional doctrine, designed to accomplish, or discourage, particular states of affairs. A Supreme Court opinion devoted to the separation of powers should, while striving for the strength of simplicity,[12] at least summarily link its analysis to the prospect of avoiding the evils that the separation of powers is intended or thought to discourage.

Dean Edward Levi observed on this score that the separation of powers doctrine "was based upon the skeptical idea that only the division of power among three government institutions . . . could counteract the inevitable tendency of concentrated authority to overreach and threaten liberty."[13] Robert Dahl has stated more succinctly that the primary Madisonian concern in the context of the separation of powers focuses on the prevention of "tyranny."[14] Sometimes, an emphasis not only on the value of political liberty, but on the framers' antipathy to the exercise of arbitrary power is added.[15]

The chief explanation for this understanding of the separation of powers role has recently been stated as follows:

> [T]he Framers of the Constitution were not trying to create a government that would discern national goals and serve them efficiently and with dispatch; they were trying to create a limited government that would serve only those goals that could survive a process of consultation and bargaining designed to prevent the mischief of factions and the tyranny of passionate majorities or ambitious politicians.[16]

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[12] *See generally* in another context Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985) (discussing the practical virtues of simple, easily understood decisions in first amendment adjudication).

[13] Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 374 (1976).

[14] *See* R. DAHL, A PREFACE TO DEMOCRATIC THEORY 6 (1956).

[15] *See* M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 14 (1967).

[16] Wilson, *Does the Separation of Powers Still Work?*, 86 PUB. INTEREST 36, 43 (1987). Professor Currie subscribes to the liberty/avoidance-of-tyranny rationale for the sep-

A similar functional account may apply to the related doctrine of checks and balances. Checks and balances as a doctrine does imply a departure from a pure division of governmental labor and from a complete autonomous isolation of governmental powers or functions. But checks and balances mechanisms such as the President's participation in the legislative process through the veto device contribute to the same general end as separation of powers. As Professor Peter Strauss has described the intent of the framers, "[i]nterpenetration of function and competition among the branches would protect liberty by preventing the irreversible accretion of ultimate power in any one."[17]

Professor Strauss quotes James Madison as considering the essence of checks and balances to lie in " 'giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.' "[18] Like the separation of powers, the checks and balances doctrine is intended "to protect the citizens from the emergence of tyrannical government by establishing multiple heads of authority in government, which are then pitted one against another in a continuous struggle,"[19] in which ambition is made to counteract ambition.

There are broader theories of the purposes or functions of the separation of powers; perhaps the most expansive treatment concludes that

> the separation of powers has been urged (1) to create greater governmental efficiency; (2) to assure that statutory law is made in the common interest; (3) to assure that the law is impartially administered and that all administrators are under the law; (4) to allow the people's representatives to call execu-

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aration of powers, yet concludes that "*Bowsher* should . . . have come out the same way if authority to administer the budget law had been given to an officer independent of congressional as well as Presidential control." Currie, *The Distribution of Powers After* Bowsher, 1986 SUP. CT. REV. 19, 23, 26 (P. Kurland, G. Casper & D. Hutchinson eds. 1987). For further argument generally along similar lines, see Miller, *Independent Agencies*, in *id.* at 41, 52-58.

[17] Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 603 (1984).

[18] *Id.* (quoting THE FEDERALIST No. 51, at 321-22 (J. Madison) (C. Rossiter ed. 1961)). *See also* Chemerinsky, *A Paradox Without a Principle: A Comment on the Burger Court's Jurisprudence in Separation of Powers Cases*, 60 S. CAL. L. REV. 1083, 1108 (1987) (the "real" separation of powers issue as whether "one branch of government [is] usurping the powers of another").

[19] Strauss, *supra* note 17, at 578.

> tive officials to account for the abuse of their power; and (5) to establish a balance of governmental powers.[20]

It is of course possible to quibble with such a broad statement of the separation of powers doctrine. Granted, the separation of powers may in some respects conduce to governmental efficiency, as, for example, in providing for centralized authority to negotiate treaties in the person of the President. It is difficult, however, to make a broader case for the day-to-day greater operational efficiency of separated powers of government.[21]

Such a broad statement of the purposes of the separation of powers introduces interesting complications, though, in that it becomes possible to suggest that certain arrangements and practices struck down by the Court as violative of the separation of powers in fact tend, in some respects, to affirmatively promote the doctrine's aims. One could easily argue, for example, that the principal intent of the legislative veto mechanisms struck down in *Immigration & Naturalization Service v. Chadha*[22] was precisely to restore or reestablish a "balance of governmental powers" for the modern era of the administrative state.[23]

The Court's disinclination in *Bowsher v. Synar* to adopt anything approaching legal realism was clearly presaged in *Chadha*.[24] *Chadha* involved a challenge to a provision[25] of the Immigration and Nationality Act that allowed either house of Congress, without the concurrence of the other house or presentment to the President, to in effect overrule the Attorney General's decision to suspend the judicial de-

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[20] W. GWYN, THE MEANING OF THE SEPARATION OF POWERS 127-28 (1965).

[21] *See, e.g.*, Wilson, *supra* note 16, at 38-43. An efficiency argument can be made to the effect that "the framers created a separate executive so that compromises, which were unavoidable in the legislative process, would not carry over into the administrative process and hobble it." Robinson, *The Renewal of American Constitutionalism*, in SEPARATION OF POWERS: DOES IT STILL WORK?, 38, 48 (R. Goldwin & A. Kaufman eds. 1986). While we would welcome an efficiency argument for the separation of powers, the better to uphold the Gramm-Rudman experiment, in the modern interest-group state, separation of powers between the legislative and executive may introduce inefficiencies by allowing disappointed interest groups a separate, independent chance at forestalling at the executive level what they have nominally been saddled with after a previous battle at the legislative stage.

[22] 462 U.S. 919 (1983).

[23] *Id.* at 967 (White, J., dissenting).

[24] *Id.* at 919.

[25] 66 Stat. 216, (codified at 8 U.S.C. § 1254(c)(2) (1982)).

portation of an otherwise deportable alien.[26] Chadha had overstayed his nonimmigrant student visa and was ordered to show cause why he should not be deported.[27] He applied for a suspension of the deportation proceedings to an Immigration Judge, who granted the request[28] and transmitted a report of the suspension to Congress.[29] The House of Representatives, however, without debate on the matter or a recorded vote,[30] passed a resolution that effectively vetoed the Attorney General's suspension of the deportation proceedings of six aliens, including Chadha.[31] Chadha raised the issue of the constitutionality of such a "one-house legislative veto."[32]

The Supreme Court struck down the exercise of this "veto" on separation of powers grounds. The Court found the resolution by the House of Representatives to be "essentially legislative in purpose and effect."[33] As such, it was subject to the Article I requirements of Senate concurrence[34] and presentment of the legislation to the President for signature or veto.[35] These requirements were not complied with,[36] and none of the constitutionally specified exceptions to bicameralism and presentment were relevant.[37] The House Resolution was therefore constitutionally invalid on separation of powers grounds.[38]

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26 *Chadha*, 462 U.S. at 923.

27 *Id.*

28 *Id.* at 924.

29 *Id.* The Attorney General acted in this regard through the Immigration and Naturalization Service of the Department of Justice.

30 *Id.* at 927.

31 *Id.* at 926-27.

32 *Id.* at 928.

33 *Id.* at 952. However, Justice Powell cogently argued that Congress had instead improperly sought to adjudicate the status of Chadha, after the fashion of a court, rather than to legislate a broadly applicable rule. *See id.* at 960 (Powell, J., concurring).

34 *Id.* at 945 (citing U.S. CONST. art. I, § 7, cl. 2).

35 *Id.* at 945-46.

36 *Id.* at 927-28.

37 *Id.* at 955-56.

38 For some of the leading general commentary on the result in *Chadha*, see Breyer, *The Legislative Veto After* Chadha, 72 GEO. L.J. 785 (1984); Elliott, INS v. Chadha: *The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125 (P. Kurland, G. Casper & D. Hutchinson eds. 1984); Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789. Professor Strauss also discusses *Chadha* in *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 633-40 (1984).

The *Chadha* Court's analysis featured the ritualistic invocation of the truism that a measure's ingenuity, convenience, or greater efficiency will not save it if it is otherwise unconstitutional.[39] The Court then made plain, through reference to the intention of the Constitution's drafters, that the aim of the separation of powers doctrine was to avoid the ultimate, if not direct or immediate, threat of despotism[40] and tyranny[41] through "the exercise of unchecked power"[42] in a way such as to jeopardize liberty.[43]

This Article has no quarrel with these principles, or with the result reached in *Chadha*. The point is merely that the Court, in a way foreshadowing *Bowsher v. Synar*, was unable to resist the temptation to, in effect, relive one of its finest hours, the decision in the steel seizure case of *Youngstown Sheet & Tube Co. v. Sawyer*,[44] in which encroachment or an arguable first step toward interbranch usurpation was clearly at issue.

In *Chadha*, by way of contrast, it is at least possible to characterize the common practice[45] of legislative veto drafting as "defensive" in nature, or as "balance-preservative." Justice White's dissent[46] depicted a state of affairs which, if accurate, would lead one to view the majority's approach as simply unresponsive and rhetorical. Without passing judgment on the merits of Justice White's analysis, there is at least some plausibility, not responsively addressed by the majority, in Justice White's view that

> without the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its lawmaking function to the Executive Branch and independent agencies.[47]

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39 *See Chadha*, 462 U.S. at 952-53.

40 *Id.* at 949.

41 *Id.* (quoting THE FEDERALIST No. 22, at 135 (H. Lodge ed. 1888)).

42 *Id.* at 966 (Powell, J., concurring).

43 *Id.* at 950.

44 343 U.S. 579 (1952).

45 Justice White referred to "nearly 200" legislative veto provisions in a wide variety of statutes drafted over the preceding half-century. *See Chadha*, 462 U.S. at 968 (White, J., dissenting).

46 *See generally id.* at 967-1003 (White, J., dissenting).

47 *Id.* at 968 (White, J., dissenting).

On Justice White's understanding, then, the enactment of legislative veto provisions had not amounted to the forging of "a sword with which Congress has struck out to aggrandize itself at the expense of the other branches"[48] but an attempt by Congress to play more than a merely initiatory role in the function of the modern administrative state. Whether Congress is in fact faced with the full severity of the Hobson's choice posited by Justice White is doubtful,[49] but the inadequacy of the majority's response, in which the view is attributed to Justice White that the legislative veto is merely a useful invention,[50] prefigures the *Bowsher* majority's avoidance of a realistic approach in passing on the Gramm-Rudman Act.

Similarly, one might easily argue, based on the cumulation of considerations discussed below, that the primary purpose of the Gramm-Rudman legislation itself was precisely "to assure that statutory law is made in the common interest."[51] If so, the effect of Gramm-Rudman on the aims or values underlying the separation of powers must have been equivocal at worst. More realistically, as we shall see below, there is no credible analysis on which Gramm-Rudman substantially threatened any of the significant purposes or values underlying the separation of powers doctrine. Instead of invalidating the statute, the Court might have responded to the judicial challenge to Gramm-Rudman by observing realistically that "[t]here is no conspiracy of power-hungry men attempting to usurp our governmental systems, and the reaction that is called for from us is not the . . . denunciation of tyranny."[52]

III. THE PRECISE NATURE OF THE BUDGET DEFICIT PROBLEM

The continuing federal budget deficit may pose problems, in light of our system of electoral politics in a modern welfare state, that differ in nature if not in magnitude from

48 *Id.* at 974 (White, J., dissenting).

49 *See, e.g.*, the proposals discussed in Levitas & Brand, *Congressional Review of Executive and Agency Actions After* Chadha: *"The Son of Legislative Veto" Lives On*, 72 GEO. L.J. 801 (1984).

50 *See Chadha*, 462 U.S. at 945.

51 *See* W. GWYN, *supra* note 20, at 127-28.

52 *See* M. VILE, *supra* note 15, at 11.

those surmounted in the past. Or so the Congress that enacted Gramm-Rudman might reasonably have imagined.

Commentators have observed internationally "the failure of national economies to grow as rapidly as government commitments to spend money."[53] As of 1984, the federal budget deficit, measured as a percentage of gross national product, has been estimated to be slightly higher in the United States than in Japan or Germany, but substantially less than in Italy or Ireland.[54] Whether such comparisons suggest a relatively serious problem is of course disputable,[55] but that is irrelevant for our purposes. Congress indisputably perceived a significant problem that, by its lights, resisted remedy through ordinary democratic processes for reasons discussed below.

The basic theory would begin with the commonplace observation that the pressures to increase or decrease public spending are not symmetrical over time. "During a recession there are pressures to increase public spending to stimulate the economy and to meet increased welfare claims[56] with more people in need. Additional spending can be justified in boom years with the argument 'After all, the money is there.' "[57]

Circumstances begin to suggest that the deficit phenomenon is not fully controllable: "Since our political conversion to Keynsianism during the Kennedy administration, we have been told that deficits today will stimulate the economy into producing full-employment surpluses tomorrow. Only tomorrow never seems to come."[58] More recent events have suggested that tomorrow arrives no sooner, and may even

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53 R. ROSE & G. PETERS, CAN GOVERNMENT GO BANKRUPT? 6 (1978).

54 *See* Wilson, *supra* note 16, at 45.

55 *See, e.g.*, B. HOGWOOD & G. PETERS, THE PATHOLOGY OF PUBLIC POLICY 101-18 (1985) (discussing the complexities in any overall normative judgment that a government is, in this respect, "gluttonous" or "obese").

56 *But cf.* R. HARDIN, COLLECTIVE ACTION 87-88, 123 (1982) (arguing that the increasingly broad scope of governmental action may tend disproportionately to benefit the middle class and relatively well-off).

57 R. ROSE & G. PETERS, *supra* note 53, at 62. *See also* J. BUCHANAN & R. WAGNER, DEMOCRACY IN DEFICIT: THE POLITICAL LEGACY OF LORD KEYNES (1977). For a discussion of various possible explanations for the expansion over time of public sector spending, see Cameron, *The Expansion of the Public Economy: A Comparative Analysis*, 72 AM. POL. SCI. REV. 1243 (1978).

58 J. BUCHANAN & R. WAGNER, *supra* note 57, at 158. *See also* Wagner, *Economic Manipulation for Political Profit: Macroeconomic Consequences and Constitutional Implications*, 30 KYKLOS 395, 408 (1977).

recede, when fiscal policy is influenced by those in greater intellectual sympathy with Arthur Laffer than with Lord Keynes.

There may well be a potential conflict in the context of political macroeconomy between what citizens want as individuals and what they want collectively.[59] While citizens may enjoy, or demand, the public benefits provided through growth or increased government spending, they have not correspondingly accepted the necessary reduction in take-home pay in the form of higher taxes. As individuals, it may also be true that "[t]he fact that citizens are not charged individually for each bit of 'jam' they secure from government gives each an incentive to seek more."[60] It has even been suggested, though it is certainly not necessary to the argument, that voter demands for increased government spending irrationally discount future serious[61] economic consequences.[62]

The problem is not merely one of narrow ideological perspective. Two leading public policy analysts have observed,

> Regardless of one's position on fiscal probity and Keynsian economics, the ease with which deficits can occur is a cause of concern, and is indicative of the ease of public spending in the absence of a revenue constraint. Spending is always easier politically than raising revenue and the separating of the two processes eliminates a major constraint on the joy of spending.[63]

When stated a bit more technically, but to similar effect, the theory is that "[f]iscal institutional structures allow intergenerational wealth transfers and the rivalry for electoral support, combined with the limited-liability nature of the contract between politicians and voters suggest that politicians have incentives to finance the output of the public sector with methods that will not yield budgetary balance."[64]

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59 *See* R. ROSE & G. PETERS, *supra* note 53, at 12.

60 *Id.* at 105.

61 It has been observed that "even if a nation's citizens continue to support an economically incompetent government, foreigners can effectively vote their lack of confidence by selling its currency short in the international money market." R. ROSE & G. PETERS, *supra* note 53, at 10.

62 *See* Brittan, *The Economic Contradictions of Democracy*, 5 BRIT. J. POL. SCI. 129 (1975).

63 B. HOGWOOD & G. PETERS, *supra* note 55, at 130.

64 Crain & Ekelund, *Deficits and Democracy*, 44 S. ECON. J. 813, 827 (1978).

Most recently, the inherent "trap" or paradox involved was formulated in the following terms:

> Even if the effects of public-debt issue are recognized by *all* members of the polity . . . the shortened time horizon in politics[65] will make this financing option preferable to taxation over some initial ranges of outlay unless there are constitutional[66] or moral prohibitions on debt issue. By borrowing the funds with which to finance currently enjoyed "goods," the participant is postponing the day of payment.[67]

Crucially, merely knowing and understanding the nature of the political problem of the public budget deficit does not itself ensure its resolution. Voters and members of Congress alike can recognize, for example, that any current-period fiscal prudence is a fragile achievement and may be utterly undone if the architects of current fiscal prudence are electorally "outbid" by later less temperate political coalitions.

As a result, on the analysis we are constructively attributing to Congress, "[t]here is simply no rational basis for an individual to support, to 'vote for,' fiscal prudence in the operation of democratic politics."[68] At this juncture, it seems utterly inadequate to respond with platitudinous references to past crises surmounted by the Republic and injunctions to courage, calm, and respect for the functioning of three separate branches of government operating within their assigned spheres in the face of recurring tyrannical ambition.

If the path of tax increases sufficient to cover spending increases seems blocked, a solution through spending re-

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65 A member of Congress may reasonably fear receiving insufficient credit electorally for measures that impose short-term pain in order to avoid massively larger pain at some later time. He may similarly expect excessive credit for measures that appear to work over only a short term, with the piper presenting his bill only at some later date.

66 Presumably, the Gramm-Rudman statute itself could count as such a "constitutional" rule, in that it would hierarchically control the effects of other spending statutes. *See infra* text accompanying notes 91-93.

67 G. BRENNAN & J. BUCHANAN, THE REASON OF RULES 93 (1986) (emphasis in the original).

68 *Id.* at 94. *See also* Ceaser, *In Defense of Separation of Powers*, in SEPARATION OF POWERS: DOES IT STILL WORK? 168, 188-89 (R. Goldwin & A. Kaufman eds. 1986) (" 'Because so many are making claims, the claim of no single group can make much difference to the level of public expenditure. Self-restraint by a particular group, therefore, would bring no discernible benefit to it or any other group.' " (quoting S. BEER, BRITAIN AGAINST ITSELF 24-33 (1982)).

ductions may be no more promising. "In practice, few politicians wish to take away specific benefits, for the recipients will protest their loss."[69] More precisely, those beneficiaries will tend to protest the loss more readily, more vigorously, and more efficaciously than the politician will be rewarded by the broad, diffuse mass of voters who derive a minimal net benefit from the politician's decision.[70]

Worse, there is a moral tendency, to some degree perverse in its effects, for politicians and the electorate to believe that to initiate a spending program is to practically bind future governments to continue it.[71] The government may be only the government of the day, but its expenditure programs may tend toward immortality. This tendency is in part based on a respectable "reliance interest" assertable by the program's beneficiaries. In major spending areas, however, such as social security, the widespread public perception that any reduction, or even any failure to regularly increase, retirement benefits would deprive the contributor of a portion of her actual past contribution is largely erroneous.[72]

As a result, past commitments to spend money in the future, whether legally binding or not, tend to overload the government's capacities to cover such spending through the increased tax resources made available through economic growth.[73] It has been wryly observed that the bread and circuses provided by ancient Rome were fiscally superior in this regard, in that they could be regarded as one-time, or at most irregular, charges on the public fisc. Such practices permit a degree of expenditure flexibility not enjoyed by the modern administrative state, in which to spend once is to create a presumption of permanency.[74] The process is, moreover, self-exacerbating: "new spending pledges must be made in the next campaign as past ones are buried in the

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69 R. ROSE & G. PETERS, *supra* note 53, at 26.

70 See generally the classic treatment of the costs of organization in M. OLSON, THE LOGIC OF COLLECTIVE ACTION (1965).

71 *See* B. HOGWOOD & G. PETERS, *supra* note 55, at 123.

72 It has been estimated that "[i]f social security systems were like private insurance companies and could not draw upon general tax revenues, benefits would have to be cut by up to one-third in major Western nations." R. ROSE & G. PETERS, *supra* note 53, at 90.

73 *Id.* at 9.

74 *Id.* at 113.

ongoing costs of government."[75]

The electoral value of a dollar of continuing spending is thus less than that of a dollar of "new" spending. But the dollars of continuing spending do not thereby become readily trimmable. It remains true that

> [p]oliticians appear to believe that by targeting specific benefits at particular pressure groups and blocs of voters they will improve their popular standing. To identify the programs to be repealed in order to permit a tax cut would stir up intense opposition among those faced with a loss, without activating support from those who might gain a very little from the cut.[76]

Recognition of such apparently intractable binds under our democratic electoral system in an administrative state has generated grave concern. At the extreme, it has been argued that "democratic societies, as they now operate, will self-destruct, perhaps slowly but nonetheless surely, unless the rules of the political game are changed."[77]

But whether self-destruction is the inevitable result or not, there is a tenable view that "something other than ordinary politics will be required to generate fiscal . . . discipline."[78] On this theory, it follows that elected politicians, as long as they remain responsive to the wishes of the electorate or the bureaucracy, "need something by way of an external and 'superior' rule that will allow them to forestall the persistent demands for an increased flow of public-spending benefits along with reduced levels of taxation."[79] Gramm-Rudman, if not perhaps a fully "external" rule, and even if not clearly a "superior" rule, was an at least intuitive attempt to devise and implement a congressional strategy to address the paradoxes discussed in this section.

IV. CONGRESS AND THE DEFICIT: ULYSSES AND THE SIRENS

At one point in his Odyssey, Ulysses was confronted with a conflict between his present, "settled," long-term, considered preferences not to die prematurely, and his predicted preferences at a later, more stressful time, to take action

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[75] *Id.*

[76] *Id.* at 112.

[77] G. BRENNAN & J. BUCHANAN, *supra* note 67, at 7.

[78] *Id.*

[79] J. BUCHANAN & R. WAGNER, *supra* note 57, at 175.

which would have forfeited his life based only on short-term motivations.[80] Based on these considerations, Ulysses chose to give controlling weight to the values or preferences of his present self as opposed to those of his predictable future self.

More recently, Professor Sunstein has, without endorsing the practical efficacy or constitutional legitimacy of a device like Gramm-Rudman, referred explicitly to laws "calling for a balanced budget" as an example of "voluntary foreclosure of consumption choices" or the political analogue of Ulysses and the Sirens.[81] Whether Gramm-Rudman in particular genuinely involved the actual preclusion of otherwise available options, in the same sense in which Ulysses' preparations practically barred his succumbing to the later temptation of the Sirens' song, is doubtful at best.

Professor Sunstein's analysis nonetheless invites us to consider Gramm-Rudman as at least of the generic class of acts analyzable partially as "an effort by the public[82] to protect itself against its own misguided [future] choices."[83] Congress might reasonably have so intended Gramm-Rudman, in light of the logical constraints posed by the deficit problem discussed in the previous section. Perhaps, in the absence of a conclusive demonstration either way, Gramm-Rudman might have served as a mechanism for resolving the paradoxes of federal deficit spending noted above. Unfortunately, the *Bowsher* Court felt it appropriate to resolve the separation of powers issues without considering explicitly the purposes of separation of powers doctrine, or the nature, as opposed to the magnitude, of the deficit-creation problem. As well, the Court failed to consider Gramm-Rudman as responsive, after the fashion of Ulysses' techniques, to the precise nature of the deficit problem.

There are of course certain benefits to be derived from ignoring any potential analogy between Ulysses' solution and Gramm-Rudman, including the simplicity and reassur-

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[80] *See, e.g.*, T. SCHELLING, CHOICE AND CONSEQUENCE 57 (1984) (quoting Richard Lattimore's translation of Homer's more poetic recounting of the preparations of Ulysses, including the judicious use of ropes and earplugs, to safely navigate past the tempting Sirens, in view of his predictable "future self's" future self-destructive impulses).

[81] *See* Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1140 (1986) (citing J. ELSTER, ULYSSES AND THE SIRENS (1984)).

[82] Or by Congress and the public, presumably.

[83] Sunstein, *supra* note 81, at 1141.

ing familiarity of the judicial opinion. But the class of identifiable "Ulysses" problems is substantial, and the problems range from the trivial to the vital. Among the less earth-shaking would be self-restraint problems addressed by such institutions as a bank's "Christmas Club" accounts which, perhaps even in exchange for slightly lower interest rates, create "ceremonial barriers to protect your account from yourself."[84]

Of perhaps greater importance, if less resonantly fiscal in its overtones, is the problem posed by the philosopher David Pears. Pears refers to the case of a driver who "goes to a party and . . . judges it best to stop at two drinks in spite of the pleasure to be had from more, because there is nobody else to take the wheel on the way home. Nevertheless, when he is offered a third drink, . . . he takes it."[85] Such a problem, which admittedly may involve complications of impaired rationality or diminished rational capacity over time, invites a range of "Ulysses" solutions to a practical problem of self-command over time.[86]

Serious "Ulysses" problems may also be drawn from the public realm. For example, an American President might believe, in moments of reflective tranquility, that not negotiating with terrorist kidnappers and hostage-holders is, all things considered, clearly the best policy. Yet the President may in fact tend, regularly, to choose to listen to the Sirens' song, and in fact negotiate, when the moment of truth comes.

Similarly, in the case of Gramm-Rudman, elected officials may perceive some need to be able to point to some allegedly "automatic" mechanism at some remove, such as Gramm-Rudman, to defuse constituency or interest group complaints over reductions in favored spending programs. This might well be so regardless of the elected officials' own disposition toward reducing spending "on the merits." There may be at least some loose analogy to the report that at one point, "Florida hotel owners were . . . needful of federal coercion to integrate [regardless of their actual preferences], to avoid being accused of doing it voluntarily and

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84 *See* T. SCHELLING, *supra* note 80, at 57-58.

85 D. PEARS, MOTIVATED IRRATIONALITY 12-13 (1984).

86 For a dramatic potential solution to such a practical problem, see T. SCHELLING, *supra* note 80, at 102.

subjecting themselves to reprisal."[87]

Such strategies can work, of course, only if the officials are able, notwithstanding their ultimate accountability, to effectively distance themselves from the politically unattractive decision. This requirement suggests that in the Gramm-Rudman context, the actual likelihood of Congress' attempting to intimidate or manipulate the Comptroller General into making, or not making, particular, identifiable budget cuts was minimal.[88] It is instead reasonable to assume that Congress' motive in enacting Gramm-Rudman was partially to protect itself from direct, obvious association with the final budget cuts at least nominally made by the Comptroller General, if under congressional guidance. Such "interference" would self-defeatingly reintroduce Congress into the logical-political trap from which it was seeking to extricate itself through Gramm-Rudman in the first place. The Supreme Court took a step beyond formalism in inquiring into the real breadth of the range of causes for which the Comptroller General could be removed,[89] but it did not consider the strong "intrinsic deterrent" from doing so.

V. The Academic Critique of Gramm-Rudman

Writing prior to the Supreme Court's decision in *Bowsher v. Synar*, Professor Kahn observed that in Gramm-Rudman,

> Congress has set a rule for itself—incur no deficit beyond the stipulated maximum—and to enforce it has adopted a strategy for dealing with violations that sets a penalty—the automatic, across-the-board spending reduction—which is both unattractive and simultaneously keeps the enterprise of deficit reduction from collapsing.[90]

While this may seem unobjectionable constitutionally, if unusual, Professor Kahn concludes that Gramm-Rudman amounts to "the attempt of one Congress to constrain future Congresses."[91] The Act "purports to regulate directly and unavoidably, in the absence of repeal, the legislative

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[87] *Id.* at 196.

[88] *Cf. Bowsher*, 106 S. Ct. at 3191.

[89] *Compare id. with* Wilson, *supra* note 16, at 38 (calling the Court's analysis on this point into question on its own terms).

[90] Kahn, *Gramm-Rudman and the Capacity of Congress to Control the Future*, 13 Hastings Const. L.Q. 185, 187 (1986).

[91] *Id.* at 185.

product of a future Congress,"[92] with the result that "[a] present Congress is stipulating limits on what that future Congress can do in the absence of a repeal."[93]

Professor Kahn's primary objection is thus not to a classic separation of powers infringement by one branch on the turf of a different, coordinate branch of government.[94] Rather, he suggests that

> the intent to control is appropriate only within a structure of hierarchy, but . . . the relationship between past and future Congresses is not that of superior to subordinate legislative authorities. The kind of control of the legislative function that Gramm-Rudman intends can only be accomplished constitutionally through the amendment process, not by statute.[95]

We often approve of Ulysses-type restraints, however, in the absence of a clear hierarchical relationship of superior and subordinate. If, for example, person A is a dieter, or a cigarette smoker, we might reasonably and morally agree to A's request at time T, that we now take and later withhold, at time T2, the chocolate eclair or cigarettes that A spurns at T1, but desperately covets at T2. Our cooperation in refusing A's predictable change of mind at T2 does not seem to rely on a strong assumption that A at T2 is simply a hierarchically subordinate person with respect to A at T1. We

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92 *Id.* at 188.

93 *Id.* at 190. For another response to Professor Kahn, see Popkin, *Legislative Self-Constraint: A Reply to Professor Kahn*, 14 HASTINGS CONST. L.Q. 205 (1987). *See also* Chemerinsky, *A Paradox Without A Principle: A Comment on the Burger Court's Jurisprudence in Separation of Powers Cases*, 60 S. CAL. L. REV. 1083, 1108-09 & 1108 n.102 (1987) (briefly making a similar point).

94 Similarly, the central focus of Congressman Jack Brooks' article, Brooks, *Gramm-Rudman: Can Congress and the President Pass This Buck?*, 64 TEX. L. REV. 131 (1985), is not on a traditional separation of powers inquiry, but on the view, ultimately not accepted in either the District Court or Supreme Court opinions in *Bowsher*, that Gramm-Rudman should be struck down as an attempt by Congress to evade its constitutionally imposed legislative responsibilities, contrary to at least a broad view of the legislative nondelegation doctrine. *Id.* at 132-33. *Cf.* Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935) (the two classic nondelegation cases, narrowly conceived, with an emphasis on the "standardlessness" of the delegation at issue). *See also* Young, *Some Reflections on Gramm-Rudman-Hollings*, 45 MD. L. REV. 1, 8-12 (1986). Of course, an "evasion" of responsibility by a branch of government, or a voluntary forfeiture of authority, if such characterized the Congress' actions in enacting Gramm-Rudman, would stand on its head the traditional separation of powers concern for constraining potentially tyrannical ambition.

95 Kahn, *supra* note 90, at 187-88.

simply are more convinced by A's arguments at T1 than at T2, partially in light of the overall circumstances.

Arguably, though, we have underplayed the difference in identity, or continuity, between predecessor and successor Congresses, particularly as opposed to the presumed continuity of identity of a single person, even over a period of time.[96] Congress is a continuing body, but its constituent members, and basic views, and its very identity, might be thought to change over time, or at least after elections, in a way arguably different from change "within" a single human being.

This may be, but it is important to remember that unlike Ulysses, or the cigarette smoker, or the dieter, Congress may be at least privately delighted with the effects of Gramm-Rudman at both T1 and, as a successor or later Congress, at T2. Similarly, the electorate,[97] to whom both Congresses may feel something of an agency obligation at both T1 and T2, may approve of the effects of Gramm-Rudman at both T1 and T2.

As well, the degree of legal difficulty in a future Congress' overriding the Gramm-Rudman constraint seems relevant. Professor Kahn recognizes that Gramm-Rudman was subject to a simple repeal mechanism.[98] While the difficulty of repeal is not to be underestimated, Gramm-Rudman involved no practical impossibilities in a change of congressional heart. Ulysses was himself bound more tightly and irrevocably. If Congress feels practically bound to adhere to Gramm-Rudman, contrary to its present will, such a feeling may proceed less from a recognition of the mechanical difficulty of repeal than from a fear that such an action might reasonably be criticized by outsiders as a repellant display of cravenness and lack of fortitude.

In the absence of any indication that the likely effects of Gramm-Rudman would have been both horribly misguided and irreversible, the objections raised to Gramm-Rudman by Professor Kahn seem insufficiently disturbing. There is even a certain practical irony in objecting, as Professor Kahn does, to the actions of one Congress in binding or imposing

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96 For some of the possible complications, see generally THE IDENTITIES OF PERSONS (A. Rorty ed. 1976).

97 We may safely set aside problems of discontinuity over time in the identity of a continuing electorate.

98 *See e.g.*, Kahn, *supra* note 90, at 188, 190.

limits on what a future Congress can do, with or without the possibility of repeal. Part of the impetus for Gramm-Rudman lies in the recognition that a Congress can effectively and conclusively bind a successor Congress, at least as effectively as would Gramm-Rudman, to continuing spending programs. A system such as Social Security, for example, creates reliance interests, a devoted, electorally potent constituency, and an appetite for additional funding.[99] Such systems may be impervious to significant spending reductions, and need not balance expenditures and receipts at any given particular time. A mechanism like Gramm-Rudman, if it works tolerably well, unbinds future Congresses at least as much as it binds them.[100]

VI. CONGRESSIONAL MOTIVATION AND THE NON-DELEGATION DOCTRINE

The *Bowsher* Court declined[101] an opportunity to preclude, in dicta, future separation of powers challenges to the constitutional status of the so-called "independent" agencies, whose chiefs do not sit at the pleasure of the President, despite the language of Article II that "[t]he executive Power shall be vested in a President of the United States of America."[102] The Court's scholasticism in resolving *Bowsher v. Synar* does not bode well for the chances of any future separation of powers attack on the legitimacy of independent agencies being resolved on the basis of an appropriate combination of traditionalism, historicism, formal analysis, functionalism, and realism.

Similarly, the Court's implicit assumptions as to congressional motivation in enacting Gramm-Rudman do not bode well for a satisfactory resolution of separation of powers

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99 *See generally* J. BUCHANAN & R. WAGNER, *supra* note 57; R. ROSE & G. PETERS, *supra* note 53.

100 Professor Kahn's view is based partially on his assumption that it is the logic of Gramm-Rudman "that in a future Congress there is likely simultaneously to be a majority in favor of spending more than the target deficits and yet no majority in favor of repealing Gramm-Rudman." Kahn, *supra* note 90, at 204. But to at least some extent, Gramm-Rudman need not be interpreted so as to dictate a particular choice between two predicted future majorities. Congress, now and later, may simply feel that Gramm-Rudman is useful in that there is no obvious, nonarbitrary way of determining which particular bit of expenditure by Congress will be the one to exceed even a unanimously agreed-upon deficit ceiling.

101 *See Bowsher*, 106 S. Ct. at 3188 n.4.

102 U.S. CONST. art. II, § 1, cl. 1. *See also* Verkuil, *The Status of Independent Agencies After* Bowsher v. Synar, 1986 DUKE L.J. 779.

challenges to administrative regulations under the nondelegation doctrine. Under the nondelegation doctrine, Congress is constitutionally entrusted with the legislative power. Congress is forbidden to delegate legislative authority to administrative agencies, especially on matters of primary or fundamental importance, unless Congress imposes an intelligible guiding principle or adequate substantive standards to constrain the agencies' discretion.

The nondelegation doctrine reached its historical zenith in 1935 in *A.L.A. Schechter Poultry Corp. v. United States*[103] and *Panama Refining Co. v. Ryan*.[104] It has not subsequently had much dramatic impact on the case law, but the revival of the nondelegation doctrine has recently loomed,[105] and a substantial body of scholarship finds the doctrine, under one formulation or another, to be meritorious.[106]

In *Panama Refining*, the Congress had statutorily[107] delegated to the President the power to prohibit the interstate transportation of "hot oil," or petroleum produced or withdrawn from storage in amounts in excess of those permitted under state law,[108] upon pain of criminal fine or imprisonment.[109] The Panama Refining Company sued to restrain the enforcement of several regulations promulgated under the statutory delegation,[110] alleging, among other grounds, an unconstitutional delegation by Congress of legislative

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103 295 U.S. 495 (1935).

104 293 U.S. 388 (1935).

105 *See, e.g.*, American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 543 (1981) (Rehnquist, J., dissenting); Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring).

106 *See, e.g.*, T. LOWI, THE END OF LIBERALISM (2d ed. 1979); Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982); McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119 (1977); Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U.L. REV. 355 (1987); Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575 (1972). For a selection of views less favorably disposed toward reinvigoration of the nondelegation doctrine, see J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); K. DAVIS, DISCRETIONARY JUSTICE (1969), Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985); Pierce, *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469 (1985); Stewart, *Beyond Delegation Doctrine*, 36 AM. U.L. REV. 323 (1987).

107 The crucial provision was section 9(c) of the National Industrial Recovery Act of June 16, 1933, 48 Stat. 195, 200 (codified at 15 U.S.C. § 709(c)).

108 *Panama Refining*, 293 U.S. at 406.

109 *Id.*

110 *Id.* at 407-11.

power to the President.[111]

The Supreme Court agreed. The Court held,

> [T]here are limits of delegation which there is no constitutional authority to transcend. We think that [the relevant statutory provision] goes beyond those limits. As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.[112]

Rather than approaching the issue of possible excess delegation through a model of ambition or the seizure of power by either Congress or the President, the Court instead talked, in more realistic terms, of "abdication." The Court recognized that Congress cannot reasonably be asked to supply statutory direction beyond a certain measure of detail in complex circumstances,[113] but declared that "[t]he Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested."[114]

This language recurs nearly verbatim in *Schechter Poultry*.[115] The petitioners in *Schechter Poultry* were convicted of criminal violations of the "Live Poultry Code" promulgated by President Roosevelt pursuant to section three of the National Industrial Recovery Act enacted by Congress.[116] The petitioners contended, *inter alia*, that the Live Poultry Code, which governed such matters as minimum wages and maximum hours within the industry,[117] had been adopted pursuant to an unconstitutional delegation of legislative authority.[118]

The Supreme Court agreed. Referring to the crucial section of the Act, the Court determined that

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111 *Id.* at 411.

112 *Id.* at 430. Justice Cardozo dissented, with his objections based less on broad principle than on application. *See id.* at 433, 434-35 (Cardozo, J., dissenting).

113 *Id.* at 421.

114 *Id.*

115 295 U.S. at 529.

116 National Industrial Recovery Act of June 16, 1933, 48 Stat. 195, 196 (codified at 15 U.S.C. § 703).

117 *Schechter Poultry*, 295 U.S. at 524.

118 *Id.* at 519.

> [i]t supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. . . . [T]he discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered.[119]

The largely standardless code-making authority was therefore unconstitutional as an improper delegation of legislative power by Congress.[120] The Court noted, as it has in virtually all of its separation of powers cases, that the existence of claimed or real emergencies cannot render otherwise unconstitutional conduct permissible.[121] It was able, however, to resist the temptation to turn the case into an encroachment or power-seeking case, using the language of "abdication"[122] instead, as it did in *Panama Refining*.

The merits of nondelegation cannot be explored here. More central to our purposes is the partial mismatch between the Court's preference for deciding separation of powers issues under the congressional ambition or usurpation model, and some of the evident motives underlying the congressional proclivity to delegate broad legislative authority to agencies. It makes little sense for the courts to adjudicate delegation cases on an explicit or implicit assumption that a congressional power seizure model of the separation of powers is relevant, if Congress is motivated instead by a desire to voluntarily surrender substantial legislative authority to the agencies, for the sake of other goals.

Congress has arguably legitimate reasons to consider delegating legal authority to administrative agencies.[123] Less attractive, though, are congressional desires to simply avoid the risks of responsibility. On some current models, it is argued that "[b]y delegating both regulatory and legislative

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119 *Id.* at 541-42.

120 *See id.* at 542. Justice Cardozo, who had dissented in *Panama Refining*, concurred in *Schechter Poultry*, analyzing the putative delegation as "not confined to any single act nor to any class or group of acts identified or described by reference to a standard. Here in effect is a roving commission to inquire into evils and upon discovery correct them." *Id.* at 551 (Cardozo, J., concurring).

121 *Id.* at 528-29.

122 *Id.* at 529.

123 *See, e.g.*, Aranson, Gellhorn & Robinson, *supra* note 106, at 21, 25; Pierce, *supra* note 106, at 490-91.

authority to the agencies, members of Congress currently shift the cost of settling political conflicts while retaining some of the political benefits of having acted."[124] Massive legislative delegation, while economizing on congressional time and effort, allows Congress to enact an enormous volume of nominal legislation "that promise[s] all things to all people."[125] Numerous conflicting goals and interests can be represented in the vague, general statute, with the "resolution" amounting only to statutory language encouraging an agency to pursue all such conflicting aims "to the extent practicable."

In the words of one commentator, "[t]he legislator can then come home claiming victory. When the constituents become frustrated later, the legislator can blame 'those damned bureaucrats.' This is . . . a political form of 'bait and switch' advertising."[126] Of course, some interests will be pleased with the outcome at the agency level. Those who are not may have been too politically weak to prevail at the agency level, and they may similarly tend to be too weak to exact electoral retribution from the congressman, even if they blame him. If otherwise powerful potential losing interests become threatening, the congressman may be able to intervene with the agency on their behalf, extracting a narrowly tailored concession for them without otherwise disturbing the agency result. The rewards for this sort of "constituent service" may be substantial.[127]

It is undoubtedly attractive to wield power, for its own sake, or in the service of what one takes to be good ends. However, each member of Congress must recognize tradeoffs between the clear exercise of power in controversial ways and its effect on his re-electability. Enacting an ambiguous, nearly vacuous, or nearly self-contradictory statute, to be sorted out at the agency level, may allow the members to claim credit with interest groups and with the broader electorate, while deflecting at least some of the most intense criticism and hostility. Hence, there is an incentive in many cases for "a legislature fleeing from choice on critical issues."[128]

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[124] Aranson, Gellhorn & Robinson, *supra* note 106, at 64.

[125] *See* Schoenbrod, *supra* note 106, at 370.

[126] *Id.* at 373.

[127] *See, e.g.*, the sources discussed in Pierce, *supra* note 106, at 491 & nn.127-29.

[128] Mashaw, *supra* note 106, at 84 (referring to the arguments of others).

This is not to suggest that the avoidance-of-responsibility model is itself a sufficient and thoroughly satisfying empirical description of congressional behavior.[129] But, equally plainly, it should not be ignored by the Court in appraising the underlying realities of separation of powers issues based on the nondelegation doctrine. To focus exclusively on the presence or absence of impermissible congressional "encroachment,"[130] or even on alleged "encroachment" by administrative agencies on congressional turf, is to get the matter largely backward.

CONCLUSION

This paper has not sought to conclusively establish the empirical claims underlying the logic that resulted in Gramm-Rudman. No claim is made here that Gramm-Rudman would have worked with crisp precision, even in the absence of a congressional override. It has been rightly observed that "[g]overnments encounter great difficulties in predicting their revenues and expenditures from year to year. Both sides of the budgetary equation depend upon too many factors to be predicted accurately."[131] Nor can it be claimed that Gramm-Rudman would have worked more effectively than any imaginable alternative techniques.[132]

But these inevitable qualifications hardly constitute an argument for the long-term collective rationality, or the controllability, of the present state of affairs in budgetary matters. Neither do injunctions to political bravery[133] on the part of Congress and the President seem responsive to the nature of the budgetary paradoxes outlined above. Sim-

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129 *See generally* Mashaw, *supra* note 106, for a critique of the Aranson-Gellhorn-Robinson model.

130 *Cf.* Stewart, *supra* note 106, at 324. "In *Chadha* and *Synar*, the Court developed workable and defensible tests for identifying constitutionally impermissible congressional encroachments on executive powers." *Id.*

131 B. HOGWOOD & G. PETERS, *supra* note 55, at 130 (citations omitted).

132 As Professor Schelling points out, having bound Odysseus himself in place, "Odysseus' sailors could just as well have put the wax in their own ears." T. SCHELLING, *supra* note 80, at 66. The most radical alternative technique, of course, would be a constitutional convention. As to this prospect, see Elliott, *Constitutional Conventions and the Deficit*, 1985 DUKE L.J. 1077.

133 Professor Schelling reports "expressions of concern that struggle builds character and the merchandising of 'instant self-control' will weaken the human spirit. I acknowledge the possibility, but cannot help comparing the argument to a similar argument we used to hear against taking the pain out of childbirth." T. SCHELLING, *supra* note 80, at 105.

ilarly unresponsive are judicial opinions that emphasize scholastic categorization of persons and functions as executive or legislative in nature, and that either ignore the aims and purposes of the separation of powers doctrine, or assume that ambition and potential tyranny must underlie institutional innovation and experimentation.